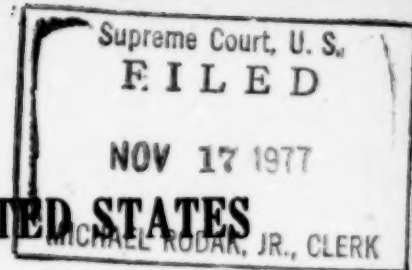


IN THE  
**SUPREME COURT OF THE UNITED STATES**



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October Term, 1977

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No. 77 - 579

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WILLIAM A. MARTIN AND F. LOUISE MARTIN, his wife,  
*Petitioners,*

*v.*

GIRARD TRUST BANK,  
*Respondent*

---

**BRIEF FOR RESPONDENT IN OPPOSITION  
TO PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF  
APPEALS FOR THE THIRD CIRCUIT**

---

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# IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

No.

WILLIAM A. MARTIN AND F. LOUISE MARTIN, his wife,  
*Petitioners*

*v.*

GIRARD TRUST BANK, *Respondent*

BRIEF FOR RESPONDENT IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

## REASONS FOR DENYING THE WRIT

The instant Petition distorts and grossly misconstrues a decision of the Third Circuit Court of Appeals in an attempt to convince this Court that that decision, although consistent with the rulings of every other federal appellate and district court that has spoken to the issue, as well as with the express provisions of the Federal Rules of Civil Procedure themselves, warrants review by this Court. The Third Circuit specifically held that a litigant who seeks relief from a judgment on the basis of allegations of fraud pursuant to Rule 60(b), Fed. R. Civ. P., must allege the fraud with particularity and, conversely, may not obtain the relief sought on the basis of general or conclusory allegations. That holding, furthermore, was



clearly limited in its application to Rule 60(b) proceedings and the particular facts and circumstances of the appeal. Nevertheless, petitioners boldly and incorrectly assert that the lower court's ruling is not so limited, but instead establishes standards which are applicable to every conceivable type of motion filed in the federal court system, regardless of its nature or the context out of which it arises. Even the broadest interpretation of the decision below would not support such a position. In addition, and despite petitioners' assertions to the contrary, no conflict exists between the holding of the Court of Appeals and any prior decision of this Court on the subject of judgments by confession, including *D.H. Overmyer Co., Inc. of Ohio v. Frick Co.*, 405 U.S. 174 (1972), for both the Third Circuit and the District Court below unequivocally found that petitioners' allegations of fraud were insufficient even to raise a question for a jury, the most minimal standard imposed upon a litigant at any stage of a proceeding. Accordingly, the instant Petition must be denied.

**A. The Standards Enunciated by the Court of Appeals Are Applicable Only to Motions Alleging Fraud as a Ground for Relief Under Rule 60(b)(3), Fed. R. Civ. P., and Do Not Establish a Standard of Particularity for Any Other Federal Court Motions.**

The primary thrust of petitioners' argument is their assertion that the Court of Appeals has, in its opinion below, embraced "the *common law* rule of 'particularity' under the broad aegis of Rule 7(b)(1), Fed. R. Civ. P.," applied that standard to motion practice generally, and, thereby, adopted a standard which "threatens motion practice nationwide at every stage of litigation." (Petition, at 12). Respondent is confident that even a cursory review of the appellate court's decision will quickly reveal the incorrectness of petitioners' position.

This case involves petitioners' motion for relief from

judgment pursuant to Rule 60(b)(3), Fed. R. Civ. P. The grounds asserted by petitioners for the requested relief were set forth in numerous allegations charging, *inter alia*, a fraudulent conspiracy involving respondent and others. The Court of Appeals held that, despite the abundance of allegata in petitioners' papers, the assertions of fraud were "at once overly general, obscure, and conclusory." (App. 35a). The court went on to state:

"Those allegations [of fraud] are not supported by averments of facts *which show or from which reasonable inferences can be drawn* that the loan to the Martins and their co-obligors formed the basis for a fraudulent conspiracy. . . ." (App. 35a-36a) (emphasis added).

It is apparent from its opinion that the appellate court was acutely aware of the fact that the sole issue before it was the sufficiency of a Rule 60(b)(3) motion for relief from judgment premised on alleged fraudulent conduct. And it is equally clear that the court's determination that the motion before it was subject to the particularity requirements of Rule 7(b)(1), in addition to being correct as a matter of law, enunciated a pleading standard limited to Rule 60(b)(3) motions and as applied to the specific facts of this case.

Petitioners now attempt to obtain a writ of certiorari from this Court by suggesting that the standards imposed by the appellate court, in a Rule 60(b)(3) context, have been made applicable, by the court's decision, to every other motion, whatever its nature, which is filed in a federal court proceeding. Such an argument utterly ignores both the clear intent and the express holding of the lower court. Judge Rosenn, writing for a unanimous panel, could not have made the court's position any clearer:

"Viewing the petition as a motion under Rule 60(b), Rule 7(b) requires that the circumstances

constituting the grounds for the fraud or conspiracy must be alleged with particularity." (App. 35a)

Nothing in the Court of Appeals opinion could possibly lead one reasonably to conclude that the same standards of particularity applicable to the assertion of fraud under Rule 60(b)(3) are to be blindly applied in like manner to all other motions filed in the federal courts. What the appellate court did recognize was that before assertions of fraud will be permitted to disturb a final judgment in the federal courts, those contentions must be supported by some degree of factual substance. In this case, the court made an independent review of the petitioners' motion and found, as did the district court, that both the requisite factual substance and a sufficient legal claim were totally lacking.

"We discern nothing after carefully reviewing the allegations in the petition that would lead to the conclusion that the Bank [appellee] was a party to any fraudulent conspiracy. The chronology reveals instead that the [appellants]' distressing situation 'is one brought about largely by [their] own misfortunes and failure or inability to pay.' *D.H. Overmyer Co. v. Frick Co.*, *supra*, 405 U.S. [174] at 182, 9 S.Ct. [775] at 781." (App. 36a)

On the basis of its findings, the court affirmed the district court's dismissal of petitioners' motion.

The decision of the Court of Appeals is properly limited, enunciating standards applicable solely to motions filed pursuant to Rule 60(b)(3) which allege fraudulent conduct as a ground for relief. As such, the opinion below does not impact upon the standards of particularity applicable to any other type of federal motion, and, therefore, does not warrant review by this Court.

**B. The Third Circuit's Interpretation of the Requirements of Rules 7(b)(1), 9(b), and 60(b), Fed.R.Civ.P., Is Consistent with the Holdings of Every Other Federal Court that Has Passed on this Issue.**

A reading of the petitioners' brief would lead one to conclude that the decision of the Third Circuit somehow establishes a novel and unprecedented pleading standard for the federal courts. However, as this Court is surely aware, the requirements that allegations of fraud in a complaint or answer be set forth with particularity pursuant to Rule 9(b), Fed. R. Civ. P., and that a motion made pursuant to Rule 7(b)(1), Fed. R. Civ. P., set forth the grounds upon which it is based with similar particularity, especially when allegations of fraud are asserted, have been upheld by every federal appellate and district court that has passed on the issue. *E.g.*, *Segan v. Dreyfus Corp.*, 513 F.2d 695 (2d Cir. 1975); *Tomera v. Galt*, 511 F.2d 504 (7th Cir. 1975); *Felton v. Walston & Co., Inc.*, 508 F.2d 577 (2d Cir. 1974); *Segal v. Gordon*, 467 F.2d 602 (2d Cir. 1972); *Jackson v. Alexander*, 465 F.2d 1389 (10th Cir. 1972); *Douglas v. Union Carbide Corp.*, 311 F.2d 182, 185 (4th Cir. 1962); *Upper West Fork River Watershed Assoc. v. Corps of Engineers, United States Army*, 414 F. Supp. 908, 918 (N.D. W.Va. 1976); *Bartholomew v. Port*, 309 F. Supp. 1340 (E.D. Wisc. 1970); *South v. United States*, 40 F.R.D. 374 (N.D. Miss. 1966); *United States v. 64.88 Acres of Land, etc.*, 25 F.R.D. 88 (W.D. Pa. 1960); *Roebeling Securities Corp. v. United States*, 176 F. Supp. 844 (D.N.J. 1959); *Sachs v. Ohio National Life Insurance Co.*, 2 F.R.D. 348 (N.D. Ill. 1942); *Steingut v. National City Bank of New York*, 36 F.Supp. 486, 487 (E.D. N.Y. 1941).

These same pleading requirements have been carried over and made applicable to motions filed pursuant to Rule 60(b). *E.g.*, *Stebbins v. Keystone Insurance Co.*, 481 F.2d 501, 511 (D.C. Cir. 1973); *Aetna Casualty & Surety Co. v. Abbott*, 130 F.2d 40 (4th Cir. 1942); *United States v. \$3,216.59*, 41 F.R.D. 433 (D.S.C. 1967).



In addition, Rule 60 itself requires that a motion for relief filed pursuant to its provisions, "must clearly establish the grounds therefor to the satisfaction of the district court." *Virgin Islands National Bank v. Tyson*, 506 F.2d 802, 804 (3d Cir. 1974), citing *Federal Deposit Insurance Corp. v. Aiker*, 234 F.2d 113, 116-17 (3d Cir. 1956). 7 J. Moore, *FEDERAL PRACTICE*, ¶60.28[3], at 407 (Supp. 1976) (citing cases). See *Westerly Electronics Corp. v. Walter Kidde & Co., Inc.*, 367 F.2d 269 (2d Cir. 1966); *DiVito v. Fidelity and Deposit Co. of Maryland*, 361 F.2d 936, 938-39 (7th Cir. 1966).

It is apparent that the holding of the Court of Appeals in this case is consistent with the law as expressly set forth in the Federal Rules of Civil Procedure and as uniformly applied by federal courts throughout the country. Accordingly, the issues raised by petitioners have no merit, nor do they present a proper or important question for review by this Court.

**C. The Court of Appeals Correctly Held that Petitioners' Motion Was Deficient on the Alternative Ground that It Failed to State Any Claim Upon Which Relief Could Be Granted; on that Basis, It Properly Affirmed the District Court's Refusal to Permit Discovery or Amendment of that Motion.**

The decision of the Third Circuit was premised upon two separate and distinct grounds: first, as previously discussed, that the allegations of fraud in petitioners' motion were not set forth with particularity pursuant to Rules 7(b)(1) and 9(b), Fed. R. Civ. P., and second, that the motion itself was insufficient as a matter of law to justify the relief sought by petitioners, even if all of the factual allegations asserted in that motion were ultimately shown to be true. (App. 35a-36a) On this second ground alone, dismissal of petitioners' motion to open judgment was justified.

Any litigant who seeks affirmative relief, at any stage in a proceeding and regardless of the type of relief sought, must initially present to the court a legally sufficient basis for the relief requested. This requirement is the most minimal standard imposed by the Federal Rules of Civil Procedure. Rule 8(a)(2), Fed. R. Civ. P. See, e.g., *Avins v. Mangum*, 450 F.2d 932 (2d Cir. 1971); *International Erectors, Inc. v. Wilhoit Steel Erectors & Rental Service*, 400 F.2d 465 (5th Cir. 1968); *Car-Two, Inc. v. City of Dayton*, 357 F.2d 921 (6th Cir. 1966); *Beeler v. United States*, 338 F.2d 687 (3d Cir. 1964); *Barnes v. American Broadcasting Co.*, 259 F.2d 858 (7th Cir. 1958).

In this instance, petitioners sought such affirmative relief in the district court by way of a Rule 60(b) motion to open judgment. The district court, quite properly, required petitioners, at the time they moved for that relief, to set forth in their papers the requisite legal basis for opening the judgment. Even the standards outlined by Mr. Justice Douglas in his concurring opinion in *D.H. Overmyer Co., Inc. of Ohio v. Frick Co.*, *supra*, 405 U.S. at 188, *et seq.*, upon which petitioners' place primary reliance, require such a showing:

"The fact that a trial judge is dutybound to vacate judgments obtained through cognovit clauses where debtors present jury questions is a complete answer to the contention that unbridled discretion governs the disposition of petitions to vacate." *Id.* at 190

Here, the District Court found that, *even accepting as true each of the allegations set forth by petitioners*, a legally sufficient basis for the relief sought was not presented, no questions for determination by a jury were raised, and the motion to open, as a result, was vulnerable to a motion to dismiss (App. 30a). The Court of Appeals agreed and unequivocally concluded that even the one allegation in

the petitioners' motion which approached any degree of specificity "cannot prevail as a defense as a matter of law." (App. 36a). Thus, even accepting the standard enunciated by Mr. Justice Douglas in *Overmyer* that a judgment by confession must be opened if "the debtor poses a jury question, that is, if his evidence would have been sufficient to prevent a directed verdict against him," *id.* at 189-90, in this instance both courts concluded, after independent analysis of petitioners' motion, that petitioners could not prevail as a matter of law on the basis of the allegations set forth in their motion to open judgment, and that a dismissal of that motion was thereby required.

For this same reason, the lower courts were justified in refusing to permit petitioners to conduct discovery on their motion. It should be obvious that once the allegations in a pleading are found to be legally insufficient, the taking of discovery to support those allegations becomes a futile act, burdening both other litigants and the court, thus, turning the discovery process into a "fishing expedition" in the truest sense. Furthermore, any party who seeks affirmative relief from a federal court is required to have in his possession, at the time he files his initial pleading, good grounds to support the allegations of that pleading. See, e.g., Rule 11, Fed. R. Civ. P.; *Heart Disease Research Foundation v. General Motors Corp.*, 15 F.R. Serv. 2d 1517 (S.D.N.Y.), *aff'd on other grounds*, 463 F.2d 98 (2d Cir. 1972); *Competitive Associates v. Fire Fly Enterprises, Inc.*, CCH Fed. Sec. L. Rep. ¶93,721 (S.D.N.Y. 1972); *Freeman v. Kirby*, 27 F.R.D. 395 (S.D.N.Y. 1961); *American Automobile Assoc. v. Rothman*, 101 F.Supp. 193 (E.D.N.Y. 1951). The appellate court concluded in this case, that the petitioners' allegations were "not supported by averments of facts which show or from which reasonable inferences can be drawn" that any fraudulent conspiracy existed (App. 35a-36a). To allow petitioners to conduct discovery in order to substantiate those inadequate

allegations would be to flout both the letter and spirit of the Federal Rules of Civil Procedure.

In this case, the legal sufficiency of the averments of appellants' "Petition" was properly tested by means of a motion to dismiss, 7 J. Moore, *FEDERAL PRACTICE* ¶60.28[3] at 409 (Supp. 1976); see *Ackermann v. United States*, 340 U.S. 193 (1950), and found to be wanting. Thus, the dismissal was proper and the denial of discovery was eminently just.

Additionally, any proceeding for relief from judgment pursuant to Rule 60, Fed. R. Civ. P., is addressed to the sound, legal discretion of the District Court, in light of all the facts then before it and any equitable considerations which are applicable among the respective parties. E.g., *Nederlandsche Handel-Maatschappij, N.V. v. Jay Emm, Inc.*, 301 F.2d 114 (2d Cir. 1962); *Delzona Corp. v. Sacks*, 265 F.2d 157 (3d Cir. 1959); *Parker v. Checker Taxi Co.*, 238 F.2d 241 (7th Cir. 1956); 7 J. Moore, *FEDERAL PRACTICE*, ¶60.19 at 227, *et seq.*, (Supp. 1976) (citing cases). On this basis too, and in light of the facts set forth in petitioners' own pleadings, the correctness of the decisions of the lower courts to bar petitioners from taking discovery and to terminate the proceedings is even more evident.

The relevant facts, as alleged in petitioners' motion, indicate that petitioner W. Martin was a sophisticated and and successful businessman as of 1973 (App. 18a); he himself sought respondent's assistance and was introduced, at his request, to the other purchasers by respondent (App. 11a-12a); he was involved in the negotiations leading up to the sale of Medford stock and in the decision to obtain additional financing from respondent for the use of Medford (App. 12a-14a); he voluntarily and knowingly signed the joint and several promissory notes at issue in return for which Medford, in which he held a 25% interest, received from respondent \$2,450,000 (App. 12a-14a); he was aware, at the time of the stock sale, that one of the



purchasers had given a power of attorney to respondent (App. 12a, 15a); and, most significant of all, petitioner W. Martin was the President and chief operating officer of Medford for the 18 months following the transactions with respondent and until February of 1975 (App. 13a). In other words, solely on the basis of the facts presented in petitioners' own motion, no one could conceivably have been in any better position to have knowledge of the facts relating to the alleged "fraudulent conspiracy" than was petitioner W. Martin himself. Given petitioners' close and continuing involvement in Medford and in Medford's transactions with respondent, given W. Martin's continuing right of access, as a director of Medford, to Medford's books and records, and given W. Martin's business experience and purported acumen, the lower courts were perfectly justified in concluding that further discovery would have been futile and that respondent should not be burdened with additional expense and further delay in the collection of its judgment. Furthermore, since the crux of petitioners' "fraudulent conspiracy" allegation: that respondent was improperly looking to them alone for collection of the joint and several notes executed by them, is a proposition which cannot succeed, on any legal or factual basis and regardless of how many discovery depositions petitioners are permitted to conduct, the lower courts, beyond question, exercised their discretion in a most judicious manner in their denial of discovery.

In the same vein, the lower courts properly rejected petitioners' contention that they should be allowed to amend their motion to open judgment. As noted by the Court of Appeals, petitioners were afforded repeated opportunities to amend their petition at oral argument in response to continued questioning by the district court as to the existence of any facts which would support their motion. Given petitioners' inability to provide such facts, the district court concluded that any amendment would be

futile (App. 37a, n.3), and the Court of Appeals found no abuse of discretion by the district court in its refusal to allow amendment of the motion.<sup>1</sup> (App. 36a-37a).

In holding that petitioners' motion was insufficient as a matter of law and that further proceedings should not be permitted, given both the futility of such proceedings and the delay and prejudice which such extended proceedings would have had upon the rights of respondent, the lower courts acted upon the most fundamental principles of federal practice. Inherent in their decisions was the recognition that before a valid federal judgment is disturbed—whether it results from confession proceedings or after a full trial on the merits—a legal and factual claim of some minimal merit, at the very least, must be presented to the court. If even this modest standard is disregarded by the courts, the entire concept of "final judgments" would be destroyed. The judgment entered by confession in this case is a proper and valid judgment, authorized by the laws of the Commonwealth of Pennsylvania, and is, therefore, entitled to be protected from debtors who seek to upset that judgment and delay its enforcement without having any basis whatsoever for the relief sought by them. And this principle is particularly applicable to the instant matter where all parties involved were sophisticated businessmen who knowingly and intelligently negotiated and entered into the transactions at issue. Both the district court and the Third Circuit found that this case involved "a straightforward commercial transaction among business people" and that "there [was no] breach of fiduciary duty on the part of the plaintiff [respondent]." (App. 30a, 36a). None

1. Additionally, petitioners were accorded two months between the filing of respondents' motion to dismiss and the hearing on that motion to amend their motion to open judgment or to present affidavits or evidence in support of that motion to the court. (App. 1a-2a). Petitioners did not avail themselves of this opportunity, thereby confirming that they had no facts in their possession upon which a valid cause of action could be premised.

of the procedural, statutory or constitutional rights of the petitioners were prejudiced in any manner by the decisions of the district and appellate courts, those decisions were clearly correct, and accordingly, they should not be disturbed by this Court.

**D. Petitioners' Constitutional Rights Have Been Safeguarded Throughout this Proceeding, and Petitioners' Assertions to the Contrary Are Groundless.**

The constitutional issues which have been so adroitly formulated and injected into this proceeding are, at best, frivolous and obscure, and, at worst, improperly presented to this Court.

It should first be emphasized that the constitutionality of Pennsylvania's confession of judgment procedure, either on a *per se* basis or as applied in this case, is not an issue in this appeal, as is suggested by petitioners (Petition at 28-29). No constitutional challenges to the cognovit procedure were advanced below and, therefore, such assertions may not be presented to this Court. *E.g.*, *United States v. New York Telephone Co.*, 326 U.S. 638 (1946).

Second, the only due process issue involved in this case is whether the proceedings below complied with the applicable procedural law, as established by the provisions of the Federal Rules of Civil Procedure. In this instance, petitioners were afforded a full hearing before the district court and had the opportunity to present whatever evidence they possessed in support of their motion for relief. All of the relevant issues were fully briefed and argued to both the district and appellate courts, and petitioners have availed themselves of their right to appeal to this Court. As is discussed at length in preceding sections of this brief, the courts below, simply stated, applied the proper legal standards in making their determination in this matter as established by the Federal Rules and, as a result, all of

petitioners' due process rights have been carefully preserved by these proceedings, despite their continual protestations to the contrary.<sup>2</sup>

Finally, petitioners' right to trial by jury has clearly not been denied. As has been discussed at length above, both the district and appellate courts found that petitioners did not set forth, in their motion to open judgment, a cause of action upon which relief could be granted. On that basis, the motion was dismissed, a procedure which may be employed by a court at various points in a proceeding. *E.g.*, Rule 11, Rule 12(b)(6); Rule 41(b)(c); and Rule 50, Fed. R. Civ. P. To suggest that a dismissal of a pleading for failure to state a claim constitutes a denial of the right to trial by jury, although a most imaginative argument, is unsupportable as a matter of law.

Petitioners' constitutional arguments are as ephemeral and obscure as was their original motion to open judgment filed in the district court. As their position is plainly without merit, it does not require further discussion, and, likewise, does not deserve consideration by this Court.

## CONCLUSION

Petitioners ask this Court to review a decision of the Third Circuit Court of Appeals which is consistent with the procedural standards employed and applied by federal courts throughout the country and which affirmed a dis-

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2. Petitioners would have this Court inquire into the substantive basis of their claim and have peppered their brief with repeated references to and colorful descriptions of the alleged fraudulent conspiracy. However, the only issues properly before this Court relate to the procedural standards relied upon by the Court of Appeals and any constitutional defect which may have resulted from their application. Inquiry into the substantive basis of petitioners' position and the law applicable thereto is premature and should first be made by the lower court should these proceedings be permitted to continue.

strict court's proper exercise of the discretionary powers vested in it by Rule 60(b), Fed. R. Civ. P., in refusing to open a valid federal judgment. Clearly, this case presents no issue of even transitory significance, and, for all of the reasons noted above, does not meet any of the criterion historically considered to be of sufficient importance to warrant review by this Court. Therefore, a Writ of Certiorari to review the Judgment Order of the Third Circuit should be denied.

Respectfully submitted,

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